Foong Weng Yee v Malaysia Smelting Corporation Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A02–185–1994
MAHADEV SHANKAR, VC GEORGE JJCA AND ABDUL MALEK J
1 AND 15 AUGUST 1995

Civil Procedure *— Appeal — Decision of judge in chambers — Application for further arguments in open court — Wrong procedure as statute prescribing procedure amended — Judge set date for further arguments to be heard — Mistake of judge — Orders which court should make — Courts of Judicature Act 1964 s 68(2)*

The appellant was a guarantor of a loan of RM282,000 granted by the respondent to a company known as Haco Sdn Bhd ('Haco'). Haco defaulted and the respondent sued the appellant and the other guarantors for the balance of the principal amounting to RM213,300, interest of RM63,452.42 and other reliefs. The respondent obtained summary judgment against the appellant before the senior assistant registrar on 19 August 1992. The appellant's appeal was heard on 8 July 1994 by the judge in chambers, who allowed the appeal and gave the appellant unconditional leave to defend. The respondent immediately applied to have the matter adjourned to open court for further argument. On 14 July 1994, the court notified both parties that the judge had directed the matter to be heard in open court on 19 August 1994. However, on 24 June 1994, the Courts of Judicature Act 1964 ('the Act') was amended whereby s 68(2) was deleted, causing the former appellate procedure of hearing further arguments in open court in respect of decisions given in chambers, became obsolete. After full arguments on the merits in open court, the judge reversed his decision in chambers and reinstated the registrar's decision. The appellant appealed. In any event, as the respondent's counsel was in doubt by early August if the procedure he had adopted was correct, he had filed a notice of appeal in the Court of Appeal on 5 August 1994 and served a copy of it on the appellant's solicitors. However, because the High Court had directed the parties to appear for further arguments on 19 August 1994, the respondent's counsel appeared on that day and made his submission on the merits.

Held, allowing the appeal:

(1) The judgment made in open court was a nullity and it was therefore set aside despite its merits. The mistake should be put right and the merits of the appeal from the registrar's judgment should be properly argued because it was evident that the decision given on 8 July 1994 in chambers was somewhat precipitate.

(2) It was ordered that the respondent's notice of appeal filed on 5 August 1994 was deemed to be a valid notice of appeal and the respondent was to file and serve a memorandum and record of appeal within three weeks so that the appeal on the merits of the judge's order in chambers could be disposed of.

[Bahasa Malaysia summary

Perayu adalah seorang penggerenti suatu pinjaman berjumlah RM282,000 yang diberikan oleh penentang kepada sebuah syarikat yang bernama Haco Sdn Bhd ('Haco'). Haco ingkar membayar balik pinjaman itu dan penentang telah mendakwa perayu dan penggerenti-penggerenti yang lain untuk baki pinjaman itu yang berjumlah RM213,300, faedah sebanyak RM63,452.42 dan relief lain. Penentang telah mendapat penghakiman terus terhadap perayu di hadapan penolong kanan pendaftar pada 19 Ogos 1992. Rayuan perayu telah dibicara pada 8 Julai 1994 oleh hakim dalam kamar, yang telah membenarkan rayuan itu dan memberikan perayu kebenaran membela tanpa syarat. Penentang dengan segera telah memohon supaya perkara itu ditangguh ke mahkamah terbuka untuk hujah selanjutnya. Pada 14 Julai 1994, mahkamah telah memaklumkan kepada kedua-dua belah pihak bahawa hakim telah memerintahkan supaya perkara itu dibicara di mahkamah terbuka pada 19 Ogos 1994. Bagaimanapun, pada 24 Jun 1994, Akta Mahkamah Kehakiman 1964 ('Akta itu') telah dipinda dan s 68(2) Akta itu telah dimansuhkan dengan akibat prosedur rayuan dahulu di mana hujah selanjutnya dibicara di mahkamah terbuka berkaitan dengan keputusan yang diberikan di dalam kamar, tidak digunakan lagi. Selepas mendengar hujah penuh atas merit kes itu di mahkamah terbuka, hakim itu telah mengakaskan keputusan yang dibuatnya di dalam kamar dan mengekalkan keputusan penolong kanan pendaftar. Perayu telah membuat rayuan. Bagaimanapun, oleh kerana peguambela penentang mempunyai keraguan pada bulan Ogos sama ada prosedur yang digunakannya itu betul, beliau telah memfailkan suatu notis rayuan di Mahkamah Rayuan pada 5 Ogos 1994 dan menyampaikan sesalinan kepada peguamcara perayu. Tetapi oleh kerana Mahkamah Tinggi telah mengarahkan pihak-pihak berkenaan itu menghadirkan diri untuk hujah selanjutnya pada 19 Ogos 1994, peguambela penentang telah menghadirkan diri pada hari itu dan membuat hujahnya atas merit.

Diputuskan, membenarkan rayuan itu:

(1) Penghakiman yang dibuat di mahkamah terbuka itu adalah terbatal dan oleh itu ia diketepikan walaupun terdapat meritnya. Kesilapan itu harus dibetulkan dan merit rayuan terhadap keputusan penghakiman pendaftar itu sepatutnya dihujahkan secukupnya kerana ianya jelas bahawa keputusan yang diberikan pada 8 Julai 1994 dalam kamar adalah agak terburu-buru.

(2) Adalah diperintahkan bahawa notis rayuan penentang yang difailkan pada 5 Ogos 1994 itu dianggap sebagai suatu notis rayuan yang sah dan penentang dikehendaki memfail dan menyampaikan suatu memorandum dan rekod rayuan dalam tempoh tiga minggu supaya rayuan atas merit terhadap perintah dalam kamar hakim itu boleh diputuskan.]

Notes

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Case referred to

Yap Ban Tick & Ors v Standard Chartered Bank [1995] 3 MLJ 401 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(2)
Rules of the High Court O 14

Appeal from: Civil Suit No 22–75–1991 (High Court, Ipoh)

Minderjit Kaur (*Minderjit & Co*) for the appellants.
Chan Sing Khuen (*Azman, Davidson & Co*) for the respondents.

Cur Adv Vult

1 August 1995

Mahadev Shankar JCA: The respondent, Malaysia Smelting Corp Bhd ('the lender') gave a loan RM282,000 to Haco Sdn Bhd ('Haco'). The appellant (hereafter referred to as 'the guarantor') and four others executed a joint and several guarantee of the loan. Haco defaulted and the lender filed a writ in the Ipoh High Court for recovery of the balance of the principal RM213,300, interest of RM63,452.42 and other relief. The guarantor was the first defendant in the action. His substantial defence was that since the guarantee was executed in point of time shortly after the loan was advanced, the consideration was past consideration and the guarantee therefore was void and unenforceable.

The lender obtained summary judgment against the guarantor under O 14 before the senior assistant registrar on 19 August 1992. The guarantor's appeal was fixed for disposal before the judge in chambers.

The guarantor's appeal was heard by the judge in chambers on 8 July 1994. The judge allowed the appeal, reversed the order of the registrar and gave unconditional leave to defend.

At this juncture we would pause to point out that on 24 June 1994, the Courts of Judicature Act 1964 was amended whereby s 68(2) of the said Act was deleted as a result of which the old appellate procedure of hearing further arguments in open court, at the instance of the aggrieved party in respect of decisions given in chambers, became obsolete.

Immediately after the decision in chambers, the lender's solicitors sent a letter to the judge asking for the matter to be adjourned into open court for further argument. A copy of this letter was simultaneously served on the guarantor's solicitors.

On 14 July 1994, the court sent a notice to solicitors of both the lender and the guarantor informing them that the judge had given a directive that further arguments be heard on 19 August 1994.

Before us on this appeal, the guarantor's counsel on being questioned by the Bench admitted that she knew on 8 July 1994 that the procedure adopted by the lender's solicitors was misconceived but she opted not to write to the court or to the other solicitors or otherwise inform them of the

misconception because according to her, she wanted to raise the matter at the hearing on 19 August 1994. She said she was inhibited from doing so earlier because she did not have the *Gazette* notification with her at the time and she wanted to produce this to the judge at the hearing. A

The lender's counsel disclosed to us that he was himself in doubt by early August if their procedure was correct and filed a notice of appeal in this court on 5 August 1994 and served a copy of the same on the guarantor's solicitors. However because the court had directed them to appear for further arguments on 19 August 1994, he appeared on that day out of deference to the judge and made his submission on the merits. B

The guarantor's counsel claims that at the adjourned hearing in open court she attempted to raise absence of jurisdiction by way of preliminary objection but she was not successful in so doing. Regrettably there is nothing in the notes of evidence to confirm this. C

After full arguments on the merits in open court the judge purported to reverse himself and reinstated the summary judgment given by the registrar. D

Against this judgment, the guarantor's counsel confined her argument to the single issue as to the validity of the judgment given on 19 August 1994. The repercussions of her inactivity about this point at a time when the error could have been prevented only came to the fore when we called for an explanation. We think this is an appropriate juncture to call the attention of all concerned to our earlier decision in *Yap Ban Tick & Ors v Standard Chartered Bank* [1995] 3 MLJ 401 (Rayuan Sivil No N–08 -139–1994) [since reported in [1995] 3 MLJ 401]. E

No doubt the judgment made in open court was a nullity and we set it aside despite what appears to be its intrinsic merits. The conduct of all concerned however, raised problems as to what consequential orders we should make. The view that we took was that the mistake should be put right and that the merits of the appeal from the registrar's judgment should be properly argued because it is evident from the material before us that the decision given on 8 July 1994 in chambers was somewhat precipitate. Our invitation to counsel for the parties to address us straightaway was not taken up because the guarantor's counsel said she would need more time. F G

In the circumstances we made a further order that the lender's notice of appeal filed on 5 August 1994 be deemed to be a valid notice of appeal and that the lender file and serve a memorandum and record of appeal within three weeks so that the appeal on the merits of the judge's order in chambers could be disposed of in due course. H

15 August 1995

VC George JCA: I have had the benefit of reading the judgment in draft of my learned brother, Mahadev Shankar JCA, and respectfully concur with it. I

Order accordingly.

Reported by Anne Khoo